

H.R. 4167 FACTS

H.R. 4167 WOULD PREEMPT STATE SHELLFISH LAWS

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Members of Congress have been assured that H.R. 4167 does not affect state and local shellfish laws. For example, during the debate on H.R. 4167 last Thursday, it was stated that “shellfish are specifically excluded from the provisions of this act.”¹

This is not accurate. At least 16 states have shellfish safety laws.² Officials at the state level have repeatedly expressed their concerns that this legislation could summarily preempt the states’ ability to enforce their shellfish laws.

For example, the National Association of the State Departments of Agriculture has stated “we believe the bill as currently written ... jeopardizes state/federal food safety cooperative programs such as ... shellfish sanitation.”³ Florida has also concluded that H.R. 4167 could preempt their shellfish safety laws.⁴ The State of New York Department of Agriculture and Markets has stated:

Food inspection enforcement laws relating to ...shellfish would be preempted. Currently there are no federal laws governing the inspection and regulation of ... shellfish harvesters and processors, or regulation of retail food establishments like grocery stores and restaurants. By failing to specifically reference these code sections in the bill, states are left to assume that state regulations, relating to inspection and enforcement of these programs, may be preempted because there are no federal laws governing these program areas. These food safety areas would then be left unregulated.⁵

In fact, as detailed below, H.R. 4167 would preempt all but a limited subset of state laws governing shellfish.

¹ Statement of Rep. Nathan Deal, Congressional Record, H537 (Mar. 2, 2006).

² Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Louisiana, Maryland, New York, North Carolina, Rhode Island, South Carolina, Texas, and Virginia.

³ Letter from J. Carlton Courter III, President, National Association of State Departments of Agriculture, to Members of Congress (Dec. 8, 2005) (online at http://www.house.gov/waxman/pdfs/letter_NASDA_hr_4167_12.8.05.pdf).

⁴ Letter from Charles H. Bronson, Commissioner of Agriculture, Florida Department of Agriculture and Consumer Services, to Members of the Florida congressional delegation (Feb. 14, 2006) (online at http://www.house.gov/waxman/pdfs/food_safety_fl_agr.pdf).

⁵ Letter from Patrick H. Brennan, Commissioner, State of New York Department of Agriculture and Markets, to Members of the New York State congressional delegation (Mar. 1, 2006) (online at http://www.house.gov/waxman/pdfs/food_safety_ny_agr.pdf).

H.R. 4167 WOULD PREEMPT CONSUMER NOTIFICATIONS REGARDING SHELLFISH

For shellfish, the bill provides an exception in the food warning section that would permit a state to require shellfish manufacturers and restaurants to disclose the risks of foodborne illnesses associated with eating raw or undercooked shellfish.⁶ This is the provision that has led proponents of the legislation to claim that state shellfish laws are not preempted.

However, there are important types of state warnings that do not fall within the bill's exception and would be preempted by this legislation. California, for example, requires grocery stores within the state to post information for consumers regarding the potential adverse health effects associated with mercury in seafood.⁷ Additionally, Connecticut is currently considering legislation to require the posting of similar information in grocery stores within its borders.⁸ While the Food and Drug Administration and the U.S. Environmental Protection Agency have recognized the serious health risks posed by mercury in fish and shellfish, they have not acted to require this information to be made available to consumers where fish is sold.⁹ As a result, these state laws and other similar state laws would be preempted under the bill.

H.R. 4167 WOULD PREEMPT SAFETY STANDARDS REGARDING SHELLFISH

In addition to preempting state warning labels, H.R. 4167 also preempts state laws that regulate the amount of contaminants or other dangerous substances in food where the state requirements are not "identical" to federal requirements.¹⁰ These provisions in the bill restrict a state's ability to protect its citizens from eating dangerous shellfish by preempting state laws setting safety standards for shellfish.

For example, Florida has a law that provides that shellfish are considered "adulterated" if harvested from an area where fecal material, pathogenic microorganisms, radio nuclides, harmful chemicals, and marine biotoxins are present in dangerous concentrations.¹¹ This law would be preempted because at the

⁶ Sec. 2, H.R. 4167 (establishing a new section 403B(g)(2) of the FFDCa).

⁷ Letter from Bill Lockyer, California Attorney General, to Rep. Mike Rogers (Dec. 13, 2005) (online at http://www.house.gov/waxman/pdfs/letter_ca_ag_hr_4167_12.13.05.pdf).

⁸ H.B. 5445, An Act Concerning Warnings Regarding Mercury in Fish and Shellfish (2006).

⁹ Food and Drug Administration and the U.S. Environmental Protection Agency, What You Need to Know About Mercury in Fish and Shellfish (Mar. 2004) (online at <http://www.cfsan.fda.gov/~dms/admehg3.html>).

¹⁰ Sec. 2, H.R. 4167 (establishing a new paragraph (6) in section 403A(a) of the FFDCa).

¹¹ Florida Department of Agriculture and Consumer Services, Division of Aquaculture, Chapter 5L-1, The Comprehensive Shellfish Control Code (online at http://www.floridaaquaculture.com/SEAS/5L1_rule.pdf)(accessed on Mar. 6, 2006).

federal level, there is no equivalent law. The Florida law cannot be deemed “identical” to a federal requirement because none exists.¹²

Another example of a law that would be preempted is a Maryland law which authorizes the Department of Natural Resources to quarantine areas populated by shellfish infected by any “destructive disease, deleterious genetic characteristic, dangerous parasite, or other biological threat.”¹³ With no identical requirements at the federal level, Maryland’s law would be preempted under the legislation.

¹² FDA regulations merely prohibit the interstate transport of shellfish that are likely to contribute to the spread of communicable disease from one State to another. Food and Drug Administration, 21 Code of Federal Regulation 1240.60 (Revised April 1, 2005) (online at <http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfCFR/CFRSearch.cfm?fr=1240.60>).

¹³ Maryland Code, Natural Resources: Title 4. Fish and Fisheries: Subtitle 7. Licensing, Regulation, and Supervision of Fishing and Fisheries in Tidal Waters: § 4-743. Quarantine of shellfish. (online at <http://198.187.128.12/maryland/lpext.dll?f=templates&fn=fs-main.htm&2.0>)(accessed on Mar. 6, 2006).